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10 *TAE K. KAI, Trustees of the Kai Family 1998 Trust*

11 **UNITED STATES BANKRUPTCY COURT**

12 **NORTHERN DISTRICT OF CALIFORNIA**

13 **SAN JOSE DIVISION**

14 In re:

15 MICHAEL HAROUTUN MIROYAN,

16 Debtor.

Case No.: 18-52601-MEH

Chapter 13

RS No. WS110

Date: January 31, 2019

Time: 9:30 a.m.

Court: 3020, Hon. M. Elaine Hammond

17 **MOTION IN LIMINE TO EXCLUDE EVIDENCE OF COUNTERCLAIMS**

18 Kai Family 1998 Trust Dated October 5, 1998 (“Kai Trust”) moves in limine to exclude any
19 and all evidence, references to evidence, testimony or argument relating to alleged claims owned by
20 Hawaiian Riverbend, LLC (“HR LLC”) against the Kai Trust, on the grounds (1) all such evidence is
21 irrelevant under Federal Rule of Evidence (“FRE”) 402 because Debtor Michael Haroutun Miroyan
22 (“Miroyan”) does not have standing to assert the alleged counterclaims, (2) such evidence will
23 necessitate an undue and needless consumption of time, and should therefore be excluded under FRE
24 403, and (3) the HR LLC counterclaims were deemed waived and extinguished for all purposes in
25 connection with the HR LLC Chapter 11 case.

26 This motion in limine is brought by the Kai Trust in connection with the evidentiary hearing
27 on their motion for full and complete relief from the automatic stay under 11 U.S.C. §362(d)(1),¹

28 ¹ Further references to Title 11 of the U.S. Code are abbreviated as the “Code.”

1 together with an *in rem* order under Code §362(d)(4) (“RST Motion”). The RST Motion seeks
2 authority to continue the judicial foreclosure² of an undeveloped lot located in Hawaii identified in
3 Miroyan’s bankruptcy schedule A/B, Item 1.4 as: “Empty Land in HI, Lot: 3-6-8-002-053,” (“Parcel
4 53”).

5 HR LLC raised several counterclaims against the Kai Trust in the Civil Action³ (“HR LLC
6 Counterclaims”), and the Kai Trust believes Miroyan will attempt to assert the HR LLC
7 Counterclaims at the hearing on the RST Motion.

8 **1. The HR LLC Counterclaims Are Not Relevant to the RST Motion, Because**
9 **Miroyan Lacks Standing to Assert Them**

10 Miroyan cannot individually pursue the HR LLC Counterclaims because they belong to HR
11 LLC. See, e.g., *Gilliam v. Speier (In re KRSM Props.)*, 318 B.R. 712, 718 (9th Cir. BAP 2004)
12 (Noting general proposition that "members of LLCs cannot assert causes of action derived from
13 causes of action owned by the LLC."); *Barker v. Gottlieb*, 23 F. Supp. 3d 1152, 2014 WL 2215920, at
14 13 (D. Haw. 2014) Under Hawaiian law⁴, "[S]tockholders . . . of a corporation do not have the right
15 to pursue an action on their own behalf when the cause of action accrues to the corporation." *Joy A.*
16 *McElroy, M.D., Inc. v. Maryl Group, Inc.*, 107 Hawai'i 423, 431, 114 P.3d 929, 937 (App. 2005)
17 (internal quotation marks and citation omitted). "Where the basis of the action is a wrong to the
18 corporation, redress must be sought in a derivative action." *Chambrella v. Rutledge*, 69 Haw. 271,
19 280, 740 P.2d 1008, 1013 (1987) (internal quotation marks and citation omitted).

20 The HR LLC Counterclaims allege injuries to HR LLC based on transactions and contracts
21 between the Kai Trust and HR LLC. None of the alleged injuries are to Miroyan in his individual
22 capacity. As such, Miroyan lacks standing to assert the HR LLC Counterclaims. See, *York v. Jordan*,

23 ² Civil Action No. 15-1-0164K against HR LLC in the Circuit Court of the Third Circuit State of
24 Hawaii (“Civil Action”).

25 ³ Kai Trust requests the Court take judicial notice of the Amended Answer To Complaint,
26 Affirmative Defenses, Counterclaims and Third-Party Complaint HR LLC filed in the Civil Action, a
27 copy of which is attached as Exhibit 1 to the Kai Trust’s Supplemental Request for Judicial Notice
28 (“Supplemental RJN”), under Rules 201(b) and 201(d) of the Federal Rules of Evidence, which are
made applicable to this proceeding by Rule 9017 of Federal Rules of Bankruptcy Procedure.

⁴ HR LLC is alleged to be a Hawaiian LLC organized in 2005 under Hawaii law. (See HR LLC
Counterclaim, Supplemental RJN, Exhibit 1, pp. 13, ¶12)

1 2014 U.S. Dist. LEXIS 196185, at *42 (D. Haw. 2014)

2 Under FRE 402, "... [E]vidence which is not relevant is not admissible." FRE 401 defines
3 relevant evidence that has any tendency to make a fact more or less probable than it would be
4 without the evidence, **and** the fact is of consequence in determining the action. The HR LLC
5 Counterclaims allege facts that are of no consequence in determining the RST Motion, and all
6 evidence in support of the HR LLC Counterclaims should therefore be excluded.

7 **2. The Probative Value of the Evidence in Support of the HR LLC Counterclaims**
8 **is Substantially Outweighed by the Consumption of Time It Would Take to Adjudicate Them**

9 Even relevant evidence may be properly excluded if "its probative value is substantially
10 outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by
11 considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FRE
12 403. The HR LLC Counterclaims against the Kai Trust are set forth in ten Causes of Action for
13 Breach of Contract(s), Conversion, Unfair Competition/Unfair Trade Practices, Tortious Interference
14 with Prospective Economic Advantage, Fraud, Promissory Estoppel, Unjust Enrichment and Quiet
15 Title. Litigation of these HR LLC Counterclaims would ordinarily require extensive discovery and a
16 trial on the merits. But it is not necessary to resolve the HR LLC Counterclaims to decide the RST
17 Motion, because HR LLC had or has rights to assert the HR LLC Counterclaims in the Civil Action
18 if they are a defense to foreclosure. Moreover, the HR LLC Counterclaims were already raised by
19 HR LLC as defenses to the Kai Trust's renewed motion for summary judgment⁵, which was decided

20 _____
21 ⁵ See Exhibit 2 to the Kai Trust's Supplemental RJN, Defendant/ Counterclaim Plaintiff Hawaiian
22 Riverbend, LLC's Memorandum In Opposition To "Plaintiffs' Renewed Motion for Summary
23 Judgment and for Interlocutory Decree Of Foreclosure"; Declaration of Ryan Smith; Exhibits "A" -
24 "J"; Certificate of Service. Miroyan is also precluded from raising the HR LLC Counterclaims by
25 the doctrine of issue preclusion (collateral estoppel), established by *Parklane Hosiery Co. v. Shore*,
26 99 S. Ct. 645, 649 (1979) and applicable to bankruptcy courts. *Khaligh v. Hadaegh (In re Khaligh)*,
27 338 B.R. 817, 824-25 (9th Cir. BAP 2006) The Kai Trust contends Miroyan had every incentive to
28 vigorously litigate the HR LLC Counterclaims in the Civil Action, and application of issue
preclusion in the RST Motion is fair and consistent with sound public policy. See, *Montana v. United*
States, 99 S. Ct. 970, 974 (1979) See *Kahoohanohano v. Department of Human Services, State of*
Hawai'i, 117 Hawai'i 262, 178 P.3d 538 (2008) (setting forth four requirements for collateral
estoppel, including, inter alia, that "'the party against whom [collateral estoppel] is asserted was a
party or in privity with a party to the prior adjudication.'" (brackets in original) (quoting *Exotics*
Hawai'i-Kona, Inc. v. E.I. DuPont De Nemours & Co., 104 Hawai'i 358, 365, 90 P.3d 250, 257

1 in favor of the Kai Trust by virtue of the Order Granting Plaintiffs' Renewed Motion for Summary
2 Judgment and for Interlocutory Decree of Foreclosure (Kai Decl., Exhibit 9).

3 Allowing evidence on the HR LLC Counterclaims would therefore be a waste of the Court's
4 time, and all such evidence should therefore be excluded under FRE 403.

5 **3. The HR LLC Counterclaims Were Deemed Waived and Extinguished for All**
6 **Purposes in Connection with the HR LLC Chapter 11 Case**

7 The HR LLC confirmed Plan was amended by the Order Confirming Second Amended Plan
8 of Reorganization Dated October 6, 2016, which provided:

9 A. Proof of Claim no. 5 in the Claim Register filed by the Kai Family
10 1998 Trust (the "Kai Trust") on August 22, 2016, in the total amount of
11 \$1,248,739.72 (the "Kai Secured Claims"), shall be deemed an Allowed Claim for all
12 purposes in this Chapter 11 Case, and the Counterclaims asserted by the Debtor against
13 the Kai Trust in that certain lawsuit entitled Kenneth Y. Kai, Trustee of the Kai Family
14 1998 Trust, et al. v. Hawaiian Riverbend, LLC, In the Third Circuit Court of the Circuit
15 Courts of the State of Hawaii, Civil No. 3CC 15-1-0164K, shall be **deemed waived**
16 **and extinguished for all purposes.** [See Declaration of Kenneth Y. Kai filed
17 concurrently herewith (the "Kai Decl."), Exhibit 7, pp. 2, Emphasis Added]

18 The Kai Trust contends the dismissal of the HR LLC Chapter 11 did not "unwaive" or
19 otherwise revive the HR LLC Counterclaims, and certainly did not vest them in Miroyan. Allowing
20 evidence on the HR LLC Counterclaims would therefore be a waste of the Court's time, and all such
21 evidence should therefore be excluded under FRE 403.

22 WHEREFORE, the Kai Trust requests an order precluding Miroyan from offering any and all
23 evidence, references to evidence, testimony or argument relating to the HR LLC Counterclaims.

24 Dated: January 29, 2019

25 /s/ Wayne A. Silver

26 Wayne A. Silver, attorney for *KENNETH Y.*
27 *KAI and TAE K. KAI, Trustees of the Kai*
28 *Family 1998 Trust*

(2004), cited in *Moyle v. Y & Y Hyup Shin, Corp.*, 2008 Haw. LEXIS 205, at *43 (2008). Miroyan is unquestionably "in privity" with HR LLC.